# SANITARY LEGISLATION.

## COURT DECISIONS.

### MASSACHUSETTS SUPREME JUDICIAL COURT.

**Unwholesome Meat—Implied Warranty in the Sale of Foodstuffs—Damages.**

GEARING *v.* BERKSON et al. (two cases). (Mar. 2, 1916.)

Mrs. Gearing, acting as the agent of her husband, purchased from the defendants some pork chops. The chops were selected by one of the defendants, who sold them. They were eaten by Mrs. Gearing and her husband, and both were made ill. The findings of fact showed that the defendants had not been guilty of negligence. The court decided that under the laws of Massachusetts Mr. Gearing could recover damages for the breach of an implied warranty that the chops were sound and wholesome, but that the warranty did not extend to any person other than the purchaser. Consequently Mrs. Gearing could not recover.

[111 Northeastern Reporter, 785.]

DE COURCY, J.: The sales act (St. 1908, c. 237, Sec. 15) provides:

Subject to the provisions of this act and of any other statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) Where the buyer expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, * * * there is an implied warranty that the goods shall be reasonably fit for such purpose.

(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

Even before the enactment of this statute, it was recognized as the law in this Commonwealth, that where the buyer at a shop relies on the skill and judgment of the dealer in selecting food, and it is made known to the dealer that his knowledge and skill are relied on to supply wholesome food, he is liable if it is not fit to be eaten; while, in case the buyer himself selects provisions, the dealer's implied warranty does not go beyond the implied assertion that he believes the food to be sound. Farrell *v.* Manhattan Market, 198 Mass. 271, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436, 15 Ann. Cas. 1076.

The application of this rule of law to the facts as found by the trial judge is decisive in the action of Percy A. Gearing. His wife, acting as his agent, left to the defendant the selection of the meat, and paid for it at the current price for sound, wholesome pork chops. (See Hunt *v.* Rhodes Bros. Co., 207 Mass. 30, 92 N. E. 1001.) The defendant Freshman undertook to make the selection so left to him. The meat was cooked, and was eaten by the plaintiff and his wife, and both were made sick "because of the unwholesome, unsound, poisonous or unfit quality or condition of said pork chops." The order of the appellate division in this action must be affirmed.

In the action of the wife, Katherine Gearing, the appellate division ordered judgment for the plaintiff on the first count of her declaration, and from this the defendants appealed. The count is apparently framed in contract, for breach of an implied warranty or condition of fitness for food. The declaration purports to be "in tort," presumably on the theory that an action of tort may be maintained upon a false

warranty. See Farrell *v.* Manhattan Market Co., 198 Mass. 271, 274, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436, 15 Ann. Cas. 1076, and cases cited. The difficulty with the case on this ground is that there was no contractual relation, and hence no warranty, between Mrs. Gearing and the defendants. The only sale was that made to her husband through her as his agent; and a cause of action in contract accrued to him thereon, as above set forth. The implied warranty, or to speak more accurately the implied condition of the contract, to supply an article fit for the purpose required, is in the nature of a contract of personal indemnity with the original purchaser. It does not "run with the goods." Williston on Sales, Sec. 244. Lebourdais *v.* Vitrified Wheel Co., 194 Mass. 341, 80 N. E. 482; Roberts *v.* Anheuser-Busch Brewing Association, 211 Mass. 449, 451, 98 N. E. 95.

Assuming that the question of Mrs. Gearing's right to recover in tort for negligence is before us, the findings of fact are conclusive against her. The sale apparently was one of "adulterated food" under R. L. c. 75, Secs. 16, 18, 24; and the violation of the statute by the defendants presumably was some evidence of negligence. Berdos *v.* Tremont & Suffolk Mills, 209 Mass. 496, 95 N. E. 876, Ann. Cas. 1912B, 797. But that is controlled by the finding of the judge, that no negligence in fact was shown on the part of the defendants. In the absence both of an implied warranty and of negligence on the part of the defendants, the action of Mrs. Gearing fails. Roberts *v.* Anheuser-Busch Brewing Association, ubi supra; Crocker *v.* Baltimore Dairy Lunch Co., 214 Mass. 177, 100 N. E. 1078, Ann. Cas. 1914B, 884; Gately *v.* Taylor, 211 Mass. 60, 97 N. E. 619, 39 L. R. A. (N. S.) 472; Wilson *v.* Ferguson Co., 214 Mass. 265, 101 N. E. 381.

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In the case of Percy A. Gearing the order of judgment for the plaintiff must be affirmed; and in the case of Katherine Gearing the order of the appellate division must be reversed, and judgment entered for the defendants.